Memorandum

Subject: INFORMATION: Conflict-of-Interest Concerns Affecting Environmental Documents

From: Associate Administrator for Program Development

To: Regional Administrators
Federal Lands Highway Program Administrator

Date: December 21, 1995

Reply to
Attn. of: HPD-1

Several recent Federal-aid projects have raised potential conflict-of-interest questions during preparation of environmental documents. Such questions are likely to increase in view of the growing number of projects proposed by State or local officials in partnership with private entities and the expanded role of local governments and private project sponsors. For that reason, I am offering guidance on conflict-of-interest issues.

Although this guidance is about conflict-of-interest, it is really about maintaining public confidence in the integrity of the NEPA process. If we fail to ensure the NEPA process is fair, complete, and credible, we will contribute to public distrust of the NEPA process and of the objectivity of transportation decisions.

Section 1506.5 of the Council on Environmental Quality's (CEQ) regulations implementing NEPA cover conflicts-of-interest in the preparation of an environ-mental assessment (EA) and environmental impact statement (EIS). I am attaching a copy for ready reference. Although Section 1506.5(b) presumes that EA's are prepared in-house, our policy extends the conflict-of-interest provision covering preparation of EIS's (Section 1506.5(c)) to preparation of EA's. Thus, for an EA or an EIS, consultants must be "chosen solely by the lead agency," which under 23 CFR 771.123(d) may be the State DOT, and must execute a dis-closure statement prepared by the lead agency "specifying that they have no financial or other interest in the outcome of the project."

These restrictions apply to our work when we are required to take an approval action, regardless of whether the FHWA is participating in the cost of the NEPA process. When Federal funds are involved, our own non-NEPA conflict-of-interest regulation (23 CFR 1.33, copy attached) also applies.

We are particularly concerned about two types of conflict-of-interest situations, both of which are especially harmful on controversial projects. The first is an actual conflict-of-interest, as when a consultant selected to con-duct a NEPA review has a direct financial or other interest in the outcome. For example, a conflict would occur if a consultant conducting the NEPA process is also under contract for the design or other later stages of work on the project. The public, understandably, typically looks at this situation as raising doubts about the consultant's willingness to select the least costly alternative or "no build." The State is responsible for ensuring that such conflicts-of-interest do not occur (i.e., by selecting the consultant, obtaining disclosure statements, controlling the work, and independently and objectively evaluating the work).

The second situation involves the appearance of a conflict-of-interest when no actual conflict exists. This type of conflict can occur when a consultant has been involved in the project at issue before being selected to conduct the NEPA review or has worked for a private party, such as a developer, who has a strong interest in the outcome of the NEPA decision. Although the consultant may conduct the NEPA review with total objectivity, the appearance of a conflict-of-interest undermines the credibility of the NEPA process and distorts public debate on the project.

The CEQ's and the FHWA's regulations cover the first situation, actual conflicts-of-interest. However, the State is best advised to go beyond the regulations to avoid the appearance of a conflict as well, especially since the public will assume the appearance is the reality.

I want to emphasize that the State's responsibility to avoid real or apparent conflicts-of-interest goes beyond projects where FHWA funds are used for the NEPA review or its direct oversight is involved. The responsibility is the same for State-funded contracts for NEPA consultant services and for reviews conducted under alternate procedures (23 CFR 172.15) that allow a State to use its own contract-review and approval process, subject to FHWA approval, and eliminate the FHWA's role in case-by-case contract review and award. In fact, we recommend modifying agreements covering alternate procedures to cover the conflict-of-interest regulations.

In many States, county or municipal governments have the authority to develop projects on the State's behalf. In contracting for NEPA or any other service on a Federal-aid project, these agencies, like the States, are subject to the CEQ's and the FHWA's conflict-of-interest regulations. Therefore, references to "State" in this guidance should be understood to apply also to county or municipal agencies working through the State transportation departments. Contracts between local agencies and consultants for NEPA reviews must be free of real or apparent conflicts-of-interest.

The involvement of private parties during the NEPA review often increases the sensitivity of the conflict-of-interest issue. This is particularly true if the private party pays for the NEPA work. Private funding is legitimate when a proposed project will primarily benefit a private party, but the private involvement must be limited to funding. In such cases, there must be no doubt about who controls the process. The State must let the contract for NEPA services and the State and the FHWA must control the scope and content of the NEPA review.

The State may want to enter into a three-party agreement with the consultant and private party to make clear that the private party is limited to paying for the work, which is under the control of the State. Entering into two separate agreements is even better. The first agreement is the contract with the consultant chosen to conduct the NEPA process. The second agreement is a reimbursement agreement with the private party providing for payment.

Nothing prohibits the State or the FHWA from considering environmental analyses or other information provided by a private party with an interest in a proposed Federal action. Such submissions may be used by the State in its own NEPA document if the State uses in-house staff or another consultant to evaluate the work objectively. Consideration of such submissions is consistent with the consideration given to any information provided by the public during the NEPA review.

In closing, the NEPA process on Federal-aid highway and bridge projects is actually a Federal process. The FHWA is responsible for it even though, consistent with the Federal-State relationship, we have delegated our authority to the State transportation departments for conduct of the NEPA review and preparation of the NEPA documents. Our duty is to furnish guidance, participate in the preparation of the NEPA documents, and independently evaluate the information they contain. The States should be formally reminded of their delegated responsibility to avoid conflicts-of-interest. Further, in very controversial situations, the States should be encouraged to obtain FHWA guidance and participation early in the deliberations and selection process to avoid even the appearance of a conflict-of-interest and to underscore the fact that in the end, the FHWA must take responsibility for the accuracy and scope of the NEPA process and the content of the NEPA documents.

If you have any questions or comments on conflicts-of-interest, please feel free to call Mr. Eugene W. Cleckley, Chief of the Environmental Operations Division (202-366-0106), or Assistant Chief Counsel Virginia Cherwek (202-366-1372).

/Original Signed by
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Thomas J. Ptak

2 Attachments